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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1487

MICHAEL DeMICHELE and MARY P. DeMICHELE

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR REHEARING

THOMAS J. CARLEY
159 Princeton Road
Rockville Centre, N.Y. 11570
Attorney for Petitioners

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To the Honorable Justices of the Supreme Court of the United States:

Petitioners Michael DeMichele and Mary P. DeMichele present this petition for a rehearing in the above entitled case and, in support thereof, respectfully show the following.

The Court's Action Herein

On June 17, 1974 this Court denied the petition for a writ of certiorari in the above-entitled case.

Reasons for Granting a Rehearing

The rehearing petitioned for should be granted for the following reasons:

THE COMMISSIONER'S RELIANCE ON *FAUSNER, INFRA*, IS INAPPOSITE BECAUSE THAT CASE DID NOT DEAL WITH ANY OF THE CONSTITUTIONAL QUESTIONS PRESENTED IN THIS CASE.

This Court opened a Pandora's box with its decision in *Fausner* v. *Commissioner*, 413 U.S. 838, affirming a Fifth Circuit decision reported at 472 F. 2d 561. In that case Fausner claimed a legislative grace deduction under §162(a) for commuting expenses and this Court ruled that Fausner was not entitled under §262 to such deduction. In that case this Court accepted as the law-of-the-case the strange agreement between Fausner and the Commissioner that commuting expenses were nondeductible "personal" expenses. Having made this strange agreement, Fausner then asked this Court to allow as a deduction part of what he conceded to be entirely nondeductible because he carried incidentals of his occupation with him, on the theory that a part of the expenses Fausner conceded to be nondeductible should be allocated to his transported flight bag and overnight bag and the part thus allocated should be deductible.

Instead of a reasoned disposition, this Court issued a short 2-page opinion quoting the Fifth Circuit to the effect that there was no rational basis for any allocation between what Fausner conceded as the law-of-his-case to be a nondeductible commuting component and the deductible business component of the total expense. This Court also quoted the Fifth Circuit's unsubstantiated assertion that Congress has determined that all taxpayers shall bear the expense of commuting to and from work without receiving a deduction for that expense. Neither this Court nor the

Fifth Circuit defined either of the terms "commuting" or "commuting expenses". Neither this Court nor the Fifth Circuit has cited any Internal Revenue Code section showing that "Congress has determined that all taxpayers shall bear the expense of commuting to and from work without receiving a deduction for that expense" — for the simple reason that there is no such Internal Revenue Code provision showing any such asserted determination.

In referring to the unreadable, vague and indefinite language of §262, this Court said:

> *We cannot read §262 of the Internal Revenue Code* as excluding such expense from "personal" expenses because by happenstance the taxpayer must carry incidentals of his occupation with him.

for the simple reason that no one can read §262 as including or excluding anything. The language of §262 is so vague and indefinite as to be unconstitutional.

The stark honesty of this Court in admitting that "we cannot read §262 of the Internal Revenue Code ***" leads also to the long established rule that:

> Taxing statutes are not to be extended by implication beyond the *clear* import of the language used; and *doubt* as to the meaning of their words *must* be resolved against the Government and in favor of the taxpayer. *United States* v. *Merriam*, 263 U.S. 179, 187.

which in turn leads right back to this Court's honest admission in *Fausner* that "We cannot read §262 of the Internal Revenue Code ***". Neither can this Court's honesty be faulted because there is no clear import of the language of §262.

JUDGE LEARNED HAND AND HIS COLLEAGUES SPELLED OUT THE ANSWERS TO THE CONSTITUTIONAL QUESTIONS PRESENTED IN THIS CASE.

As Second Circuit Judges Chase, Learned Hand and Manton clearly explained the matter in *Davis* v. *U.S.*, 87 F. 2d 323, 324, 325 (CCA 2d 1937), *cert. denied* 301 U.S. 704, 81 L.Ed. 1359, 57 S. Ct. 937 (1937), there are two separate and distinct classes of deductions:

FIRST CLASS (Constitutionally Required) DEDUCTIONS- *those deductions over which Congress has no power or control* - deductions such as ordinary and necessary expenses incurred in getting or obtaining receipts, cost of property sold, depreciation, depletion and the like. Such First Class deductions are "inherently necessary" *as a matter of computation* to arrive at "income" which may be taxed. This First Class (Constitutionally Required) Deduction mandates a decision for petitioners in this case.

SECOND CLASS (Legislative Grace) DEDUCTIONS - deductions of another sort like personal exemptions, deductions for taxes paid, losses sustained in unrelated transactions and other like privileges which Congress sees fit to accord to taxpayers. Such Second Class deductions, *as distinguished from the First Class*, are allowed by Congress wholly as a matter of grace, citing *New Colonial Ice Co.* v. *Helvering*, 292 U.S. 435. These distinguished Second Circuit judges, at page 325 of the *Davis* case, thus gave full recognition to *New Colonial Ice Co.* as a Second Class case not concerning any First Class constitutional question. [1]

The Court (at page 324 of the *Davis* case) cautioned that First Class (Constitutionally Required) deductions "*are not to be confused*" with Second Class (Legislative Grace) deductions. First Class deductions are required *as a matter of computation* to arrive at "income" which constitutionally may be taxed. Second Class deductions are permitted to reduce true "income" down to an artificial "taxable income" if Congress decides to impose a tax on a lesser amount than constitutionally it could.

1 The Commissioner's reliance on *New Colonial Co.* v. *Helvering* (a/k/a *New Colonial Ice Co.* v. *Helvering*) 292 U.S. 435 (Memo 3) is entirely inapposite inasmuch as that case did not deal with any constitutional questions as here presented. The facts and law of that case are abundantly clear in the context of the case then decided by the Supreme Court. That case dealt with the years 1922 and 1923 and the question of whether one (New) corporation was entitled under Section 204 (b) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 231 to reduce its income by deducting losses suffered in a prior year by a second (Old) company.

There was no question in that case about the computation of gross income or loss of either the New company or the Old company. The New company claimed that *its* gross income (*its* receipts minus *its* expenses incurred in obtaining *its* receipts) should be reduced by the losses suffered by the Old corporation in a prior year. The Court explained, at page 439, that

> What is being taxed in this instance is the income realized by the new company in conducting the business after the transfer; and the sole matter for decision is whether, under Section 204 (b), there shall be deducted from that income the losses suffered by the old company in its conduct of the same business before the transfer.

In deciding against the New company's argument that the gross income of the New company must be reduced by the Old company's prior year losses to arrive at taxable income of the New company, the Court explained at page 440 that

> The power to tax income *like that of the new corporation* is plain and extends to the gross income.

In deciding against the New company's claim that it should be able to deduct from *its* gross income (*its* receipts minus *its* expenses) pursuant to Section 204 (b) the losses suffered by the Old company in a prior year, the Court explained at page 440 that

> Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed.

Thus the Court decided that the gross income of the New corporation could not be reduced artificially for the year in question by losses sustained in a prior year by a different corporation.

There was no question presented or decided in that case concerning "income taxation" of the New corporation's "expenses". The Court decided that each taxpayer was an entity by itself and could not claim *another* taxpayer's expenses or losses unless Congress made special statutory provision to reduce the *true* gross income (receipts minus expenses) of the New corporation down to an artificial "*taxable* income" against which tax rates will be applied to determine an income tax liability.

Neither was there presented or decided in that case any question concerning "income taxation" of the Old corporation's "expenses". Indeed it is clear that the Old corporation's "expenses" were neither taxed nor attemptedly taxed as "income" to the Old corporation.

UNDER THE DOCTRINE OF *DAVIS* V. *U.S.*, *SUPRA*, THE PETITIONER HEREIN IS ENTITLED TO DEDUCT HIS ORDINARY AND NECESSARY EXPENSES INCURRED IN OBTAINING HIS WAGES *AS A MATTER OF COMPUTATION* TO ARRIVE AT INCOME WHICH MAY BE TAXED.

The facts of this case are very simple. Petitioner Michael DeMichele deducted from his $10,506.37 wages his admittedly ordinary and necessary trade or business driving expenses of $1,984.38 incurred in obtaining his $10,506.37 wages to arrive at his admitted gross income of $8,521.99 from his trade or business.

Not satisfied with imposing an income tax on petitioner's $8,521.99 gross income from his trade or business, the Commissioner is attempting to impose an *income* tax on $575.47 of Petitioner's $1,984.38 admittedly ordinary and necessary trade or business *expenses* because "the description of the job site indicates that storage of tools was feasible." The Commissioner's attempt is irrational and unconstitutional.

Boiled down, the Commissioner's position in this case is that, of the Petitioner's $1,984.38 driving expenses, $1,408.91 driving expense is deductible and that he can impose an "income" tax on the remaining $575.47 driving "expenses" — although the Commissioner cannot explain how he claims to have such authority to tax "expenses".

The Commissioner's position is untenable in face of, and repugnant to, the 16th Amendment to the Constitution.

At no time or point in that case was there presented or decided any question concerning the New company's own expenses of running its own business. No one had the temerity even to suggest that the New company's own *expenses* of operating its own business could be subjected to an *income* tax either directly or indirectly.

CONCLUSION

The petition for rehearing, as well as the petition for a writ of certiorari, should be granted and the case set for oral argument.

Respectfully submitted,

THOMAS J. CARLEY
159 Princeton Road
Rockville Centre, N.Y. 11570
Attorney for Petitioners

July, 1974

Certificate of Counsel

I, THOMAS J. CARLEY, attorney for the above-named petitioners, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds above specified.

THOMAS J. CARLEY
Attorney for Petitioners